NS Car Dealers Limited v Shivaji & another (Civil Appeal E033 of 2023) [2023] KEHC 21605 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21605 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E033 OF 2023

DKN MAGARE, J

JULY 24, 2023

BETWEEN

NS CAR DEALERS LIMITED ..... APPELLANT

AND

JERRY RUSSELS SHIVAJI ..... 1ST RESPONDENT

EVANS MUHADIA BUSAKA ..... 2ND RESPONDENT

JUDGMENT

1. Vide a memorandum of appeal dated 15 January 2023 the Appellant, who was a defendant in the lower Court, filed his appeal raising to fasten the grounds against the decision of the chief magistrate of Mombasa CMCC 1326 of 2019 the judgement was delivered by J B Kalo on 19th January 23 and set out the following grounds: -

    a. The magistrate erred in introducing a ground of frustration that was not pleaded in the plaint.

    b. In granting reliefs which were not only contrary to earlier findings, but also amounted to re-writing of the contract.

2. The urged the court to allow the appeal, their set aside the decree and dismiss the suit in the lower Court in the lower court.

3. To begin with I need to appreciate the Appellant in their pleadings. The memorandum of appeal is concise and in accordance with order 42 rule 1. It is a model memorandum of appeal. It crystalizes the issues and is not argumentative. Order 42 rule 1 provides as doth: -

    " 1. Form of appeal –

        (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

Duty of the first Appellate court

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

5. This court cannot set aside the court's discretion at whims. The discretion of the court before must be judicious and not capricious. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

6. The duty of this court, being the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " ""...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

7. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

8. In the case of Peters vs Sunday Post Limited [1985] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

9. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

Pleadings

10. The Respondents filed suit on 6/8/2019 claiming that they bought motor vehicle registration no. KCN 940 G. The agreed purchase price was Kenya shilling 1,450,000/=. A sum of Ksh 670,000/= was paid on the date of purchase. The balance was to be paid in installments of 100,000/= on 15/3/2018 and Ksh. 680,000 in installments of Ksh.56,500 every 21st of every month beginning 21st March 2018 till payment in full.

11. They also stated that they were to pay 20,000/= for installation of a car track. They reportedly paid this amount in cash on the day of purchase. The vehicle had zero mileage and arrived in Nairobi with a speedometer (I Understood this to mean the odometer) showing 517KM.

12. After 4 days the Appellant provided certificate of roadworthiness showing that the odometer reading was 91605 KM. They thus realized that the Appellant tampered with the odometer to make it zero. This resulted in the Respondents retuning the vehicle. The appellant wanted more money to give then an imported vehicle.

13. The Appellant did not refund Ksh 670,000 and 20,000/= being the purchase price and car track respectively. They thus claim these amounts as money had and received.

14. The Appellant defendant filed defence on 5/11/2019. The Appellant admitted entering into an agreement for Ksh. 1,450,000 and payment by installments as pleaded, that is Ksh, 670,000/= as deposit, Ksh. 100,000/= on15/3/2018 and balance by 12 monthly instalments of 56,500 on 21st of each month. They however denied that they aforesaid amount was paid. In other words, the whole Ksh. 1,450,000/= was due and owing.

15. The appellant stated that Ksh 31,400/= for insurance and 20,000/= for car track was to be paid. They dispute that the amount was paid. It is their position that the vehicle was delivered unto the respondents after they were satisfied of the same being of good merchantable quality. They stated that the Respondents were in breach of the sale agreement and as such were not entitled to the reliefs sought. No particulars of breach were however given.

Respondent's Submissions

16. The Respondent filed submissions on 10th May 2023. They gave a very long background of facts. They also rely on the authority of Cm Construction East Africa Limited v Lux Homes Limited [2017] eKLR, where justice Onguto at paragraphs 18 and 19 stated as follows: -

> " 18. I hold the view that the Plaintiff has established what it needed to prove on a balance of probability to succeed on its claim for fraud and deceit. The Plaintiffs evidence established that was fraudulent representation made by the Defendant which was material and induced the Plaintiff to act to his detriment: see Downs v Chappel [1996] 3 All ER 344.
>
> 19. The Plaintiff had been told lies in order to induce it to pay the amounts now claimed. It suffered loss as a result. I find that the Defendant through its agents willfully made false statements with the intention that the Plaintiff should act in reliance upon it and when the Plaintiff did act, the consequence was loss and damage as the monies paid were in consideration of nothing ultimately. I would hold the Defendant responsible for the Plaintiff's loss which was relatively foreseeable."

17. They state that the court rightly found the contract was frustrated. They state they were shown the vehicle by one Suleiman. They state that ground one of the memorandum of appeal was thus spent.

18. They relied on the Ugandan case of Hajji Kavuma vs First Insurance Company Ltd (CIVIL SUIT No. 442 OF 2013) [2018] UGCOMM 65 (7 May 2018); where the court, Justice B Kainamura, held as doth: -

> " As earlier stared, the burden of proof in this matter lay upon the defendant and on a standard higher than a balance of probabilities. In my opinion, it was an allegation which was not fully proved to the satisfaction of the court that the risk was courted by the plaintiff.
>
> However, non- disclosure and misrepresentation alleged and proved by the defendant goes to the root of the contract as they were in breach of utmost good faith.
>
> Therefore, it is my considered onion as it was held in the case of carter versus Boehm (supra) the breach of this duty renders the contract voidable, there was no breach of contract done by the defendant as it exercised it right to terminate contract because of the dishonesty by the plaintiff. The breach done in my opinion was done by the plaintiff who breached his duty of utmost good faith."

19. Though the above case was related to insurance, the court notes that the issue of non-disclosure and concealment is applicable to sale of goods.

Appellant's submissions

20. The appellant field submissions dated 4/5/2023. They lamented that the court was introducing the issue of frustration. They rely on the same case the Respondent relied of Cm Construction East Africa Limited v Lux Homes Limited [2017] eKLR, where justice Onguto at paragraphs 19 stated as doth: -

> " 19. The Plaintiff had been told lies in order to induce it to pay the amounts now claimed. It suffered loss as a result. I find that the Defendant through its agents willfully made false statements with the intention that the Plaintiff should act in reliance upon it and when the Plaintiff did act, the consequence was loss and damage as the monies paid were in consideration of nothing ultimately. I would hold the Defendant responsible for the Plaintiff's loss which was relatively foreseeable."

21. They rely on Nyaga Stockbrokers Limited v Solomon Embeni Bwonya & another [2019] eKLR where the Justice C W Githua held as doth: -

> " Turning to the first issue, Black's Law Dictionary 10th Edition at page 785 defines the term frustration as:
>
> > " The prevention or hindering of the attainment of a goal, such as contractual performance ... an excuse for a party's non-performance because of some enforceable and uncontrollable circumstance..."

The learned authors proceed to define the doctrine of frustration in contracts as:

> " The doctrine that if a party's principal purpose is substantially frustrated, by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated."

In Gimalu Estates Limited & 4 Others V International Finance Corporation & Another [2006] eKLR which was cited by the appellant, Emukule, J (as he then was), relying on Chitty on Contracts described the doctrine of frustration in the following terms:

> " ...the doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract has rendered it physically or commercially impossible to fulfill the contract or has transformed performance into a radically different obligation from that undertaken in the contract. The doctrine is not concerned with the initial impossibility, which may render a contract void "ab initio" as where a party to a contract undertakes to perform an act which at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement."

23. The Court of Appeal in Lucy Njeri Njoroge V Kaiyahe Njoroge, CA No. 161 of 2002 [2015] eKLR cited with approval the case of Davis Contractors Limited V Farehum UDC, [1956] AC 696 in which Lord Radcliff stated as follows:

> " ....frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. "Non haec is foederi veni" It was not what I promised to do... There ... must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for".

22. The Appellant also relies on the case of Billey Oluoch Okun Orinda v Ayub Muthee M'igweta & 2 others [2017] eKLR, where the court held as doth: -

> " 19. As to whether it is necessary to specifically plead "frustration", we cite Owour, J.A in Kenya Commercial Finance Co. Ltd –vs- Kipng'eno Arap Ngeny & Another- Civil Appeal No. 100 of 2001 where it was held:
>
> > " A party who wishes to rely on a frustrating event cannot as in this case simply mention it in passing as was done in paragraph 11 of the Amended Plaint that I have set above. Particular facts which they seek to rely on resulting in the frustration of the contract must be clearly set out in the pleadings to enable the other side to prepare and defend the same. This not having been done, the learned Judge was clearly wrong."

23. I agree with the Appellant that the court relied on frustration which was not pleaded. However, the duty of this court is to re-evaluate the evidence and come up with an independent decision. The court below was not correct in calling the circumstances as frustration. The claim in the court below was a claim for the refund of a purchase price as money had and received.

Evidence

24. The 2nd Respondent testified on 27/7/2022. He adopted his statements. He was toughly cross examined. He admitted that he took the vehicle as is where-is-basis. The odometer was reading zero. The odometer was reading 517 in Nairobi. However, at the pre export inspection, the odometer was reading 91,605 km. They agreed to replace the vehicle but did not replace.

25. DW1, Nadim Kana adopted his statement. He denied that a vehicle can be zero once it is used. He confirmed that he was present when the vehicle was returned. They sked the Plaintiffs to collect the vehicle but they refused. He stated that they don't sell zero mileage vehicles at their yard. He admitted he was not present when after the Respondent inspected the vehicle. They talked to someone else. Though he admitted the vehicle was retuned over the zero mileage issues, they did not acknowledge receipt.

26. They had sold the said motor vehicle. He stated they repossessed the vehicle from their yard. The repossession is neither in his statement nor in the defence. The vehicle was returned before the fist instalment was made. He stated they had 200,000/= which they demanded from the respondent. On being pressed, he admitted they did not demand 200,000/= from the Respondents. The agreement was executed by the director of the company. The delivery did not show they documents were given to the plaintiff.

Analysis

27. The court maintains and will always maintain that parties of bound by their pleadings. Appellant admits that the respondents had the vehicle returned the vehicle. The respondent was awaiting replacement but he has not been given. The Appellant does not admit in its pleadings that the vehicle was returned or sold or otherwise dealt with.

28. In Gandy v. Caspair Air Charters Ltd. (1956) 23 EACA 139 Justice Sir Sinclair, V-P, as he was then, said:

> " The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given."

29. I adopt this mantra. Parties must be bound by their pleadings, it is not enough to throw evidence to the court during the hearing that has no basis in pleadings.

30. The return of the vehicle happened before the parties went into the next phase of the agreement. There is no pleading filed in this court challenging the repudiation by way of return of the said motor vehicle. I am satisfied that on pleadings, this is not a claim for breach of contract but for money had and received. I will demonstrate this shortly.

31. This is a fairly straight forward appeal. It is on sale of goods. The first impression I get from the evidence of the Appellant is that he is a liar. He is so blatant that he kept shifting. The first aspect is that there is a written agreement signed by the Respondents and the Appellant's director. The witness herein witnessed nothing. He acknowledges the vehicle was returned. He is aware the dispute was over zero mileage. He attempted to state that the documents were given to the Appellant on the same day. His evidence is inconsistent even with his own statement.

32. Secondly, the is a cock and bull story about repossession. There was no repossession. The Respondents delivered the vehicle back to the Appellant since the odometer was tampered with. It is irrelevant who tampered with it but it common ground that the Respondents were given a vehicle with less mileage than it was on 21/4/2017, a year before purchase.

33. The said vehicle was accepted back to the yard. Once a vehicle has a tempered with odometer, it is not as sis where is. The concealment of tempering is aground to vitiate the contract for sale. The same was Cancelled by return of the vehicle. Nothing transpired till the summons to enter appearance were issued to the Appellant.

34. The defence was that the money was no given to the Appellant. However, the consideration is given as 1,450,000 with cash deposit of 670,000/=. The installments talked about are from 15/3/2018. I therefore agree with the lower court that there was a deposit of 650,000/=.it does not real matter the nature of the agreement but it is clear it is a sale agreement.

35. Car track is stated to be 20,000/= but it is not shown whether there was a deposit or not.

36. I Agree that the court should not have said that the contract was frustrated. The contract was actually canceled by the Respondent returning the vehicle and the Appellant receiving the same. The only quarrel the Appellant had was that they were not paid Ksh 670,000/=and therefore, as a corollary, there is nothing to return.

37. I agree that if they were not paid, they should not return. However, the parties who wrote the agreement are all alive. The agreement says there was payment. The Appellant did not explain, how the Respondents left with a car on sale without a single coin being deposited.

38. Surely, the only issue was the fist installment had not been paid. The first installment was 56,500/=. The deposit was in two sets, Ksh.670, 000/= cash deposit and Ksh 100,000/= on 15/3/2018. The vehicle was returned before 15/3/2018. Effectively only 670,000/= had been paid in terms of consideration.

39. Under section 19 of the *sale of goods act*, the propery in the goods pass at the time parties agree. In this case, the property was to pass together with the risk at the end of the 12 instalments of Ksh 56,500/=/=. The section provides as follows: -

> " 19.
>
> (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case."

40. Parties were in agreement that the price of the car depended on the mileage. In this case the mileage was indicated as zero only to find that the same was tempered with. The Respondents treated the contract as repudiated and re-delivered the goods and did not remain them. The seller accepted delivery and has confirmed they sold the vehicle. The seller still had title to the goods, the buyer having repudiated the contract of sale.

41. Under section 13 of the sale of goods it is the duty to look at the circumstances to see whether the change in mileage is a breach of warrant or condition. This however, became moot once re-delivery was accepted. The said section provides as doth: -

(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.

(3) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any conditions to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(4) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise."

42. Further, until transferred, the goods remain the seller's section 22 of the sale of goods provides as doth: -

> " 22. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not: Provided that— (i) where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for that fault; (ii) nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party."

43. The contract was no frustrated but repudiated by return of the goods. Tough not bound to return the Respondent went an extra mile to rerun the goods to the Appellant's yard. This completed a cancellation. There was no contract ot breach. The claim therefore became a claim for money had and received. The seller had no reason to continue retaining the Respondent's money long after the contract was repudiated.

44. In any case, the Appellant did not sue to save the contract from repudiation. Section 37 of the *sale of goods act* provides as follows: -

> " 37. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

45. I presume he returned because he collected them. I have noted certain penalties in the contract. These apply only when there is breach. In this case, it was a clear case of repudiation of a sale of goods contract. It is the *sale of goods act* that governs the sale of goods and not the contracts act per se. Even where

the contract is as is where is basis, it must conform with the general appearance. Where there has been latent defects that are not inherent but have been induced by the seller, then as is means as shown and not as the seller wants it to be.

46. I note that penalty clauses are being used with abandon. They cannot be used to hide unmerchantable goods being sold with fraudulent intent. I use this term loosely as the case is not based on fraud.

47. Lest the Appellant complain that the defence was not considered, it is important to address their case. The defence was a general denial. Defences of that kindly are wholly unhelpful. In The case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, the court of Appeal stated as doth: -

> " The main object of this rule and {order vi} r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of O. 6 r 13(1)(a)."

48. The appellant also pleaded breach of contract. Nothing was said of the particulars of breach. Under order 2 rule 10, the Appellant was obligated to plead particulars of breach of contract, if there was such a breach. The said provision provides as follows: -

> " 10. Particulars of pleading
>
> (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
>
> (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he

relies, and the order may be made on such terms as the court thinks just.

(3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party—

(a) where he alleges knowledge, particulars of the facts on which he relies; and

(b) where he alleges notice, particulars of the notice.

(4) An order under this r. shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(5) No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No. 2 of Appendix B which shall be served in duplicate.

(6) Particulars delivered shall be in Form No. 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings.

49. The purported breach of contract is therefore untenable. I am unable to find evidence in support of paragraph 2 of the memorandum of Appeal. I have no doubt in my mind that the vehicle was returned. The claim remaining was for money had and received by the appellant for a sum of Ksh. 670,000. There is no pleading that this money was returned.

50. There must be a specific claim and pleading on not only payment or refund of this money but how it was refunded. The parole evidence cannot be used to oust the claim in writing that the Appellant received that money. Order 2 rule 4 of the civil procedure rules, which supports this position, posits as hereunder: -

" 4. Matters which must be specifically pleaded

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading

51. Without such a pleading, there is nothing the defence could stand on. There is no pleading that they have refunded or the car was repossessed. I hold and find, as the court below did that the Ksh 670,000/ = was received by the Appellant and the said money has not been refunded.

52. This is informed on the burden of proof that was on the parties. The respondent discharged their burden vis-à-vis, the claim for Ksh. 670,000/=. This burden is not much. It is that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.

53. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

> " Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
>
> The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence."

54. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

55. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

56. I am not convinced that the Respondents were given a car to walk out with, without payment. At least in submissions, a sum of Ksh 670,000/= was admitted. But state that the same is a non-refundable

deposit. This comes in as understand in event of breach. There was no breach pleaded and there wasn't any as a fact. This was a case of repudiation on basis that the mileage had been tempered with.

57. It is patent that the Appellants misunderstood the law on these events. The vehicle was return due to the discrepancy between the mileage in government records an zero on the odometer. At the time of return the complaint was that this vehicle has less mileage than the KEBS Report. The vehicle was left with the Appellant. There is not pleading that the said vehicle was sold but it is just that, an allegation. The Appellant retained the thing itself. That thing has the odometer readings.

58. They were best placed to produce evidence to the contrary. To the court below, it is enough that the vehicle was returned with a zero-mileage dispute. The parties receiving should have been able to say that this was not true as we received the vehicle with this kind of mileage. Assume it was not true that the odometer was tempered with, the court was not invited by the defendant to deal with that issue.

59. Section 112 of the *evidence act* provides in scenarios like this. The Appellant has the vehicle and knows the mileage. If the same was sold, there needed to be a pleading to that effect.

60. In any case, there will have been no difference whether the odometer was tempered with. The truth is that the contract was repudiated. The reasons are irrelevant. The vehicle was given back to the seller who took delivery and repudiation was complete by dint of the *Sale of Goods Act*. The remedy for the seller was to sue for unjustified repudiation. That is now a story for another day, another place, another season.

61. As regard to 20,000 for the tracker there was no evidence that there was cash payment for the same. I also hold that the tracker is a consumable like fuel and insurance that the defendant. The Defendant had no use for the same after repudiation of contract.

62. Upon reading the second ground of Appeal, I have no doubt in my mind that only the issue of the tracker is contrary to what is contact the rest are consonant with the evidence and pleading. It is not that the 20,000 was not paid but the contract does not indicate when it was to be paid. It is also in the same schedule with insurance that they had not paid. The was nothing stopping the parties indicating it was a cash deposit. I note that even from the itiatial demand, of 6/9/2018, the same was not demanded. It falls in a hazy field that it is neither proved nor disproved. In such a case, it is that it was not proved. from I am aware of the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] Eklr, court cannot rewrite a contract between parties and I agree. The court stated as doth: -

> This, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
>
> As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):
>
> > " It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

63. The court also has no Duty to help a party that does not help itself. The Appellant was given a vehicle by the Respondents. It took possession of the vehicle and stuck with the money. The Appellant should not in any case sold a vehicle with a tempered with odometer. They never refused possession,

never challenged the repudiation and as such, as per section 37 of the *Sale of Goods Act*, the sale was repudiated.

64. In the case of Hajji Kavuma Vs First Insurance Company Ltd (CIVIL SUIT No. 442 OF 2013) [2018] UGCOMM 65 (7 May 2018) relied on by the respondent, Justice B Kainamura, held as doth: -

> " In The non-disclosure and misrepresentation claimed by the defendant amounts to fraud alleged constructively.
>
> In the case of HIH Casuality and general insurance ltd versus Chase Manhattan bank (2003) UKHL Rix LJ, regarding non-disclosure and fraud held that: -
>
> > I am conscious that in carter versus Boehm itself, lord Mansfield does seen to have considered that there is a difference between concealment which the duty of good faith prohibited and mere silence... as a result, non-disclosure in the insurance context in the early years was referred to as concealment and the doctrine has sometimes been referred as constructive fraud.

65. The Appellant did not disclose that the odometer had been changed. They had documents of title and certificate of road worthiness. They did not give the respondent till he was safely away from Mombasa, 4 days later. It is the Appellants who concealed material particulars. They sold a vehicle at zero mileage and concealed that it had already covered 91, 605 km. This made the contract voidable at the instance of the buyer. The buyer acted on the same and repudiated the contract.

66. It makes no difference between what the court below said and what the court is saying. There was no contract capable of being enforced. A refund was due and owing.

67. The Appellant received a demand for 670,000/=. They did not bother to respond to the same. They received the plaint and did not respond to whether they have refunded 670,000/= or not. They should forever, keep their peace.

68. Even purely on justice and good conscience, the Appellant cannot keep both the money and the box. This is the nadir of dishonest dealing and the court below was correct in finding the Appellant liable.

69. The Respondents were right in repudiating the contract of sale by returning the vehicle as it did not fit the description. I therefore dismiss the appeal for lack of merit except that I amend the original judgement and remove the sum of Ksh 20,000/= for the tracker which was not proved.

Determination

70. In the circumstances I make the following orders: -

a. The upshot of the foregoing is that the Appeal lacks merit and as such it is dismissed with costs of 95,000/= to the Respondents.

b. A sum of Ksh. 670,000/= is payable to the respondent being money had and received.

c. A sum of 20,000/= for the car tracker is set aside.

d. Interest at court rates on the sum of Ksh. 670,000/= from 6/8/2019, the date of filing suit in the lower courts with interest in the lower Court

e. Costs be paid within 30 days, in default execution do issue.

f. Any money deposited as security be released to the Respondents forthwith.

g. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF JULY 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr Ngaira for the respondent

Mr. Ondego for the for the Appellant